

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1206

To be argued by
JOHN F. TRIGGS

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

SY YOAKUM GUTHRIE, III,

Defendant-Appellant.

*On Appeal from a Judgment of the United States District Court
for the Southern District of New York.*

BRIEF FOR APPELLANT

GLASS GREENBERG IRWIN
PELLMAN & SLADE

Attorneys for Appellant

540 Madison Avenue
New York, New York 10022
(212) 838-6670

LEONARD R. GLASS

JOHN F. TRIGGS

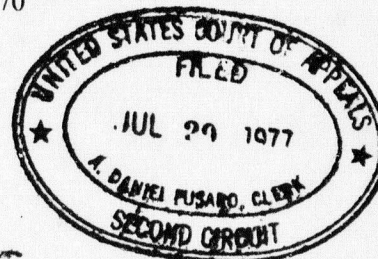
Of Counsel

and

PETER LUSHING

Of Counsel

60 East 42nd Street
New York, New York 10017
(212) 986-8310



10956

LUTZ APPELLATE PRINTERS, INC.

Law and Financial Printing

South River, N.J. New York, N.Y. Philadelphia, Pa. Washington, D.C.
(201) 257-6850 (212) 840-9494 (215) 563-5587 (202) 783-7288

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Statement of the Issues.....	2
Statement of the Case.....	2
POINT I: THE EVIDENCE WAS INSUFFICIENT TO GO TO THE JURY.....	25
POINT II: ADMISSION OF APPELLANT'S PRIOR CONVICTION WAS REVERSIBLE ERROR.....	38
1. The Prior Crime Was Not Similar To The Crimes Charged In The Court Below.....	38
2. The Prior Crime Was Not Presented To The Jurors In A Manner So They Could Deal Intelligently With It...	46
POINT III: ADMITTING HEARSAY PROOF OF AN ALLEGED PRIOR BOND FRAUD BY APPELLANT WAS REVERSIBLE ERROR.....	53
CONCLUSION:	60

TABLE OF AUTHORITIES

	Page
United States v. Baum, 482 F.2d 1325 (2d Cir. 1973)	54
United States v. Beno, 324 F.2d 582, 587, 589 (2d Cir. 1963).	39
United States v. Blount, 229 F.2d 669, 671 (2d Cir. 1956).	51
United States v. Braverman, 376 F.2d 249, 252 (2d Cir.), cert. denied, 389 U.S. 385 (1967).	45
United States v. Byrd, 352 F.2d 570, 574 (2d Cir. 1965).	52
United States v. Clark, 475 F.2d 240, 250 (2d Cir. 1973).	51
United States v. De Garces, 518 F.2d 1156, 1159 (2d Cir. 1975)	25
United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972).	52
United States v. Freedman, 445 F.2d 1220, 1224 (2d Cir. 1971)	45
United States v. Klein, 515 F.2d 751, 756 (3rd Cir. 1975)	46, 47, 50
United States v. Leonard, 524 F.2d 1076, 1091 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976)	39
United States v. Pacelli, 491 F.2d 1108, 1115 (2d Cir.), cert. denied, 419 U.S. 826 (1974).	58
United States v. Ratley, 284 F.2d 553, 554 (2d Cir. 1960).	45
United States v. Rosenblum, 339 F.2d 473, 475 (2d Cir. 1964).	45

TABLE OF AUTHORITIES

	<u>Page</u>
United States v. Santiago, 528 F.2d 1130, 1134 (2d Cir.), cert. denied, 425 U.S. 972 (1976).	40
United States v. Shurtleff, 43 F.2d 944, 948 (2d Cir. 1930).	45
United States v. Smith, 343 F.2d 607, 609 (2d Cir. 1965).	45
United States v. Walker, 176 F.2d 564, 566 (2d Cir.), cert. denied, 338 U.S. 891 (1949).	45
Federal Rules of Evidence 201(b)(2).	39
403.	51
404(b)	44
801(d)(2)(E)	57
802.	57
803.	57
2. J. Wigmore, Evidence §302 at 196, 200 (3rd ed. 1940)	39

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-1206

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

SY YOAKUM GUTHRIE, III,

Appellant

On Appeal from the United States District Court for the
Southern District of New York

BRIEF FOR APPELLANT

SY YOAKUM GUTHRIE, III

STATEMENT OF THE ISSUES

Whether the evidence was sufficient to go to the jury.

Whether a prior crime was similar enough to the crimes charged to be admissible on intent.

Whether the jury was properly informed and instructed on the effect of a prior crime.

Whether the admission of hearsay evidence that appellant committed a prior bond fraud was reversible error.

STATEMENT OF THE CASE

Sy Yoakum Guthrie, III, appeals from a judgment of the United States District Court for the Southern District of New York (Dudley B. Bonsal, J.) rendered on January 11, 1977, convicting him upon a jury verdict of five counts of wire fraud (18 U.S.C. §1343) and sentencing him to two years imprisonment on each count, to run concurrently with each other but consecutively to a sentence previously imposed in the Central District of California.

An indictment filed on April 8, 1976, was superseded by an indictment filed August 5, 1976, charging appellant and five other individuals with a total of twelve counts of wire fraud (18 U.S.C. §§1343, 2), perjury (§1623), travel fraud (§§2314, 2), and obstruction of justice (§1503). (The indictment, as redacted for the jury, appears at A-3*). Appellant himself was charged with five counts of wire fraud and one count of travel fraud. His co-defendants pleaded guilty before trial.

Appellant's trial began on November 16, 1976, and concluded on November 30, after seven days of trial. The evidence, all of which was presented by the Government, was as follows (the evidence will be presented in the order of testimony):

EDWARD FUCILLO, a lawyer, was the corporate secretary of General Motors Acceptance Corporation and is president of Madison Investment Corp., which owned a parcel of land on which it wanted to build a hotel and office building. (43-44*) After banks had turned down a \$750,000 loan request, money broker Don Running referred Fucillo to Jack Smith, who referred Fucillo to Dick Cauble. (45-49)

*Numbers in parentheses not preceded by the letter "A" are pages of the trial transcript.

Fucillo spoke to Cauble in October 1975, and was told a bank might lend the money. (50-51) Fucillo met with Cauble and went over the project. (51) Cauble had Fucillo then meet with Bill Glass in Glass' office; the three went to the United Americas Bank in the building, where bank officials turned down the loan. (54-56)

In November Cauble called Fucillo and suggested obtaining a guaranty bond with the help of Jerry Silver. (56-57) A guaranty bond is a promise by an insurance company that a loan will be repaid. (58-59) On December 3 Fucillo met with Cauble and Silver. (58) An agreement was signed whereby Fucillo would pay a \$7500 deposit to Silver, and Silver would obtain a guaranty bond in 14 days or refund the money. (58-59) They assured Fucillo that there was no problem and that the bond would be gotten in 14 days. (61)

Fucillo called his corporation partners in Florida and had them wire \$3750 to Silver's New York account. Fucillo spoke to Smith around December 5, who said Sy Guthrie was in California and would be brought to New York to speed things up. (61-62, 67) This was the first Fucillo heard of Guthrie. (67) Smith and Guthrie met with Cauble around December 7. (67) At that meeting Guthrie said he had been a banker and the parties then reviewed the

project and it was agreed they would meet with brokers Bill O'Grady and Harry Goldberg to obtain the bond. (68,69)

On December 10 Cauble came to Fucillo's office and said he had the bond but that Fucillo had to be paid \$2500 for it. (70) Fucillo got his partners to wire the money and gave cash to Cauble. (70-71) When the expected copy of the bond was not given Fucillo the next day, he had numerous telephone conversations with Guthrie and Cauble. (73) Basically Guthrie said that Cauble was trying to get the bond. (73-74) Next there was a meeting between Fucillo, Cauble, Guthrie, and eventually Glass, who was said to be coming to pick up Cauble to get the bond from Goldberg. (74) Glass did pick up Cauble, and Fucillo and Guthrie stayed behind. (75)

At a later meeting in mid-December with Fucillo, Cauble, Guthrie and Silver assured Fucillo that the bond would be had. (75-76) Between this meeting and Christmas time Glass said they were with Goldberg or O'Grady trying to get the bond. Cauble and Guthrie said they were to pick up the bond Christmas Eve. (76)

Christmas Eve Fucillo waited in his office until 6:00 o'clock but did not hear from them. (77) The next morning he got a call from Smith who said that Cauble

had gotten drunk but had told Smith they have the bond.

(81) Between Christmas and New Year's Fucillo spoke with Guthrie, who said they had the bond and that Cauble was going to St. Louis for funding, and that the bond would have to be subdivided. (81) Cauble also told Fucillo he was going to St. Louis. (84)

In December Fucillo recorded telephone conversations he had with Guthrie, Cauble, Smith and Silver. These tapes were played, subject to connection. (94) The transcripts [marked as 3500 exhibits (98-99)] of the tapes show in essence: the conversations between Fucillo and Guthrie have statements by Guthrie referring to efforts to get the bonds by Guthrie and others. On the tapes Guthrie says: the American General Group of insurance companies will be doing the bond (000347*); the \$2500 Fucillo gave Cauble will be given to Goldberg (000347); Cauble has the bond but letters stating when the balance will be forthcoming still have to be worked out (000357-58); Bill O'Grady said that Fucillo will actually get the money on Tuesday (000358); Cauble said that "we don't have everything finished" (000360); Cauble said "just let us work on it and we'll get it done" (000360). The conversations with Guthrie also make reference to various

*Numbers in parentheses preceded by "000" are pages of the transcripts of the telephone tapes.

persons Guthrie considered contacting in an effort to get the funding. (000344-45)

Conversations between Fucillo and Smith have Smith describing details about obtaining the bonds; Smith says: "we'll be funded before the end of the year" (000350); "we been approved for the million and a half" (000351); something is wrong in the documents (000365); O'Grady has been on the phone twice today with Cauble and with an attorney in St. Louis about the language in the letters (000365).

The calls between Fucillo and Cauble contain Cauble's statements of steps he was taking to get the bonds: he will get the bonds by January 15 (000383); the St. Louis people can fund the bond (000385); the insurance company will be American Fidelity & Fire (000385); Cauble will have the bond "no matter what" (000385, 000387); it will be a two year bond (000389); Fucillo will have a \$300,000 bond Monday morning (000389); "Sy! Well, I'll tell you, Sy gets out and he promises certain things, to people and when he drinks a little but makes some promises he can't keep and then he tries to just keep buying time, Ed, and it's not good" (000376); "what [Guthrie] did on Wednesday morning, was delay this money coming down and he does it very subtly, so that both sides" (000376); "[Guthrie] just tries to buy time, he figures he can another few days,

you know, and which is not right Ed, and I wasn't aware that he was telling you even that I was on out, that I was out working around on this this morning because that office was closed today, you know" (000377); there is a bond for Fucillo and it has been committed for \$300,000 (000378); "I can't trust what [Guthrie] tells me " (000379); ". . . I definitely will get that bond. That I will definitely get" (000381); "I really have no doubt of being able to fund that first 300 to you one way or the other." (000382)

Fucillo called O'Grady early in the New Year and asked if he was going to supply a bond; in a subsequent conversation O'Grady said "no." (106, 108) Cauble then phoned Fucillo and said there was no bond because Fucillo spoke freshly to O'Grady, which Fucillo denies. (108-09)

Fucillo never got the bond. (114) He eventually demanded and had \$3750 returned by Silver. (113-14) He never asked Guthrie for any of the money. (168) He doesn't think he saw Guthrie after New Year's, and had his last telephone conversation with Guthrie Christmas week. (169, 171)

JACK W. SMITH, member of the Bar of Colombia, and a financial and real estate consultant, testified that mortgage broker Donald Running told him that Smith should

meet with Fucillo in New York. (173, 177) Smith met Guthrie at Glass' office through an introduction by Cauble. (178) Fucillo met with Smith elsewhere that afternoon, and showed Smith documents relating to the development program, and said he needed \$700,000. (181) Smith offered to put him in touch with Cauble. (181) The next day Smith met Cauble and told him about his conversation with Fucillo. (181-82) Smith returned to Florida and spoke to Cauble almost daily, about a project of Smith's own and Fucillo's project. (185) Cauble thought he might get a combination bond for Fucillo and Smith's projects. (186) Meanwhile Guthrie told Smith he was seeking a bond through insurance companies. (187) In mid-November Smith met Guthrie in New York and discussed aspects of getting the bond. (187-89)

Smith was told by Cauble the bonds would be funded in New York; Silver told him he thought he could get the bond in a matter of days. (191-92) Later Cauble said Silver was working on the bond, and there were several calls from Guthrie. (192) Smith asked Silver why he needed the advance fee Silver and Cauble had requested of Fucillo. Silver said it was to pay for the bond. (193-94) Smith continued to get reassurances from Cauble that the bond was forthcoming. (195-96) Guthrie in mid-December said

he needed an airplane ticket to come to New York from California, and he'd be able to secure the bond within 24 hours. (196) Smith gave Guthrie the ticket. (196)

Smith then met Guthrie at a hotel and Guthrie said he had been successful in obtaining a bond and they were just waiting for O'Grady to sign the final documents. (199-200) The next day Smith met with Guthrie and Cauble, who said they were going to try to fund the bonds in Philadelphia or New Jersey. (200) Two days later Cauble said that his source for funding had not materialized. (202) There were further conversations between Smith and Cauble relating to excuses for not obtaining the bonds. (203-07) Guthrie said he and Cauble were obtaining the bonds. (206) Cauble kept reassuring Smith there was a bond and it would be written. (208) In early January Cauble said the bond had to be paid for, and would then be written. (209) Smith's last conversation with Guthrie was Christmas week, when Guthrie said the bond would be momentarily written. (214-15)

WILLIAM GLASS, a New York lawyer, met Cauble in early 1975, and the latter began working out of Glass' office to try to sell commodities. (276, 280-81) Glass met Guthrie in November 1975 through Cauble and one Eskildson. (283) Around the end of November Fucillo was brought to Glass' office by Cauble and Guthrie. (284) After the unsuccessful

attempt to get financing from the bank in Glass' building, Cauble told Glass about financial guarantee bonds. (289-90) Glass discussed this with Guthrie on December 9. (290) Cauble said they along with Fucillo would meet with Goldberg and Guthrie would set up the meeting. (292) Cauble told Glass Goldberg could get the bond. (292) In a restaurant meeting Glass told Fucillo that he didn't know very much about obtaining the bonds and they would keep working on it. (293) Cauble pulled Glass away from Fucillo and told him they would pick up Guthrie and go see Goldberg and that Fucillo was not going with them. (293-94)

Glass, Cauble, and Mr. and Mrs. Guthrie drove to Goldberg's house in Brooklyn. (295) After three-quarters of an hour Guthrie spoke to Goldberg about obtaining the bond. (296) Goldberg said "I have been through this before and I don't want any more of it because the last time" he obtained these bonds Goldberg had lost his right to deal with this very good bonding company, because the person who was to obtain the bond had called the company and this angered the people at the company. (296-98) Goldberg finally said to call him at his office, since he didn't want to discuss business at home. (298)

The next day Cauble told Glass he had told Guthrie to pursue Goldberg on the bonds. (311-12) There was talk of additional documentation needed, and Goldberg told Glass that with time the bonds would come through. (312-13)

Bond forms were discussed and a form was brought to Glass' office in the presence of Cauble and Guthrie. (314-15) There was daily communication between Glass, Cauble and Guthrie in December. (316-19) In mid-December, Glass, Guthrie and others waited one and one-half hours for Goldberg to show up with the bond, but he never did. (320-21) A check for bonding fees by Cauble for \$1000 was cashed by Glass for Cauble, but the check bounced. (322)

Reasons advanced for the delay in the bonds were the need to wait for the bond form, not being able to use a certain group of insurers, need for more information from Fucillo, and various people being unreachable on given days. (325-27) In the third week of December Cauble told Glass a New York company was issuing the bond; on December 19 Cauble went to St. Louis, to check out the possibility of raising the moneys from a union. (328-34) On his return Cauble told Glass only the approval of the fund's directors was needed and funding was now only a matter of time. (334)

At Cauble's request, Glass wrote a letter for the St. Louis fund attesting to certain legal aspects of the loan (336); Cauble went back to St. Louis and told Glass on his return the prospects were excellent. (338-39) Meanwhile Goldberg was away on vacation and Cauble was telling Fucillo that things looked good as to St. Louis. (339, 342). Around the end of the year, Glass thinks, Cauble began to lose heart. (344)

In January Fucillo complained to Glass about having paid out several thousands and being given the run-around.

(344) Glass told Cauble to straighten this out with Fucillo. (345) There was subsequently a meeting with Glass and Goldberg at which Goldberg said that he had received \$950 for work done in attempting to obtain the bond for Fucillo. (348-49)

Turning to the other scheme to defraud charged in the indictment, Glass testified to being introduced to David Wilson in December by Guthrie. Wilson was looking for a loan for his Miami nursing home and Guthrie and Cauble thought Goldberg could effectuate a bond deal. (350-51) Cauble and Guthrie had asked Glass to be an escrow agent, holding the bond until premiums were paid and counter-signing them. (357) Guthrie advised that the matter could be pushed through, if the nursing home had the necessary documents, based on what Goldberg had told them. (359, 361) The next day Wilson and his attorney, Jones, agreed with Glass on a fee for Glass of \$5000, to include non-premium disbursements. (362) A wire transfer of this sum was made from Florida. (362)

At a meeting of Wilson, Jones, Cauble, Guthrie and Glass later that day Guthrie said the bond would be ready that evening. (364) Glass gave Cauble his car keys to go

to Valley Stream to pick up the bond, but Cauble returned without it, saying Goldberg told him it couldn't be signed until the next morning. (364. 366) On December 17 Wilson and Jones came to Glass' office, Cauble having said that the bond would be issued momentarily. (368, 371) Wilson and Jones demanded their money back. Glass called Goldberg who said he had been harassed, he could not get the bonds, there was no deal, and he was tired of the whole situation. (373) Glass gave Wilson a check for \$5,000 and asked him to hold it for a week. (373-74) When informed of what had happened, Cauble said he wanted to check with Goldberg; a few days later Cauble said the bonds were obtainable. (375) Guthrie also said it was feasible to continue with the deal. (376) Cauble said it was Wilson's failure to furnish certain financial statements which had caused the deal to blow up. (376) So Glass stopped payment on the check. (376) After this, Glass dealt with Cauble and not Guthrie. (378-79) because he felt it best if Cauble dealt directly with Goldberg, and not through Guthrie as an intermediary.

Glass summed up his activities by stating that he didn't think he started out with the intention of deliberately trying to defraud anybody; things just didn't work out, generally speaking. (399) Glass could not remember making a knowingly false statement to Fucillo;

as to statements to Wilson if Glass didn't know they were false, he should have. (403, 425) He had reason or should have had reason to know excuses given to Wilson were not valid. (404) If Glass had been instrumental in obtaining Fucillo's loan for him, Glass would have received about 5% as a finder's fee. (414) Half of this would be split with Cauble, and Guthrie and his associates would share the other half. (417-18) However, there was no pre-arrangement with Guthrie regarding the Fucillo fee in particular. (420) Glass did extend efforts on Fucillo's behalf and was eager that the bond be obtained. (434, 440) Glass, Cauble and Guthrie looked forward to the day when the Fucillo deal would be completed, because of the commissions they would obtain. (473) Guthrie's share would be \$20,000 minus what he would pay his associates. (474) Guthrie never told Glass the bond for Fucillo had been approved. (476) Goldberg never told Glass it would be impossible for him to furnish the Fucillo bond. (479) Guthrie had a similar interest in the successful completion of the Wilson business. (478) Guthrie would have cleared about \$12,500. (488) Guthrie was not given or promised any part of the \$5,000 Glass received on the Wilson matter. (489) Glass did not intend to mislead Wilson and Jones when he met them. (485)

STANLEY SILVER a financial consultant and broker-agent, testified he first met Guthrie twelve years before trial and Cauble two years before trial. (507,509) Silver met David Wilson through Silver's former employee, Fred Wohlfield. (511) In September 1975 Silver and Wilson discussed the financing of Wilson's nursing home and Silver learned about financial guarantee bonds to be issued by an insurance company from Guthrie (511-12).

Guthrie told Silver that he knew a Mr. Haynes associated with the insurer who could issue bonds. Guthrie said Haynes was interested in writing the bond. (513-14, 516) Meanwhile, Wohlfield made an agreement with Wilson for a fee if the bond was procured; a \$5,000 deposit was taken under the agreement. (516-17) Silver heard Guthrie talking on the telephone, apparently to Haynes to come to New York to review the papers in connection with the bond. (518-19) Haynes broke the appointment and Guthrie tried to set up other appointments. (519-20) Guthrie put Silver in touch with Goldberg, who said it seemed possible to get Wilson a bond; Guthrie believed strongly in Goldberg coming through. (520-22)

Silver learned of Fucillo in November 1975 through Cauble, and signed an agreement with Fucillo in December. (525) Silver took a \$3750 deposit from Fucillo. (527-31)

He asked his employees to submit the Fucillo request to Goldberg. (532)

Guthrie told Silver the Wilson loan didn't close, once, because of a lack of a document Wilson was to furnish and once because Goldberg needed \$1,000 which was not forthcoming. (535-36) Also, the Fucillo matter would not close until Goldberg received \$1,000. (537-38, 540) At a meeting in the middle of December Guthrie and Cauble told Fucillo that the bond could be issued if Fucillo was prepared to pay for it; Fucillo did not want to pay for it until he was sure he could borrow against it. (542) Wilson was told that Goldberg could obtain a bond only for \$300,000 until the end of the year, with the balance requested after January 1. (546)

Guthrie told Silver the Fucillo bond had been approved, but that Fucillo would not pay for it until the funding took place. (547) Cauble also told Silver the bond had been approved. (551) There was talk with Guthrie about changing the form of the bond because a different company was to issue it. (552-53) Cauble asked Silver to send \$1,000 to Glass to take care of Goldberg's demand for \$1,000; Silver did so, but then stopped payment. (554) Between Christmas and New Year's Guthrie told Silver the bond was approved. (557) Guthrie now was working with O'Grady instead of Goldberg. (558) Guthrie said Fucillo in speaking to O'Grady had upset him so now the bond would not

be issued. (561) Cauble and Goldberg also said this.

(561) In January Silver returned \$2,000 of the \$3,750 Fucillo had put up. (563)

Silver had acted in good faith all along, and never knowingly told a falsehood to Fucillo. (571, 588) Silver had successfully obtained financial guarantee bonds for over ten years. (592) He had worked with people such as Goldberg who represented and worked with the insurance companies who issued the bonds. (600)

RICHARD CAUBLE testified he worked out of the office of Glass and Glass trying to make deals. (653) He spoke to Guthrie first in August 1975 and met him that October. (656) They discussed borderline loan packages that were having trouble, and Guthrie said he had three programs that might be of help. (660) Goldberg and Haynes were mentioned. (66) The fee would be six points of the amount of the financing, four for the bonding company and two to Guthrie and whoever was doing business with him. (662)

Jack Smith introduced Fucillo to Cauble, who said he thought financing could be arranged. (663-64) Cauble described the unsuccessful attempt to arrange financing at United Americas Bank, and a meeting with Goldberg, who said he would consider the deal and contact Guthrie. (665-66) Guthrie later told Cauble that Goldberg thought the package was "doable." (666) At Guthrie's suggestion, Cauble took Fucillo to Silver who said it was doable, and

the agreement was drawn up: a bond to be delivered in 14 days for 7 points of the loan. (667-69) Earlier Guthrie had told Cauble the bond would be approved as he had worked with Harry Goldberg and knew he could get the bond from him. (673)

After Fucillo gave Silver half the \$7500 requested, Cauble and Guthrie tried to get \$2,500 from Silver to give to Goldberg for the bond. (676-77) Silver was in Europe, however, so Cauble asked Fucillo for the \$2,500, and got it. (678) Cauble deducted \$500 for himself and gave the rest to Guthrie to give to Goldberg. (680) There next ensued a little technical difficulty getting the bond. (681-82) Cauble, Glass and Guthrie met with Fucillo and told him the bond was approved and they were trying to get Goldberg to finish it, and they would pick it up that night. (682) At Goldberg's house Goldberg said he hadn't submitted the application yet to a bonding agent; Cauble asked who the bonding company was so they could at least tell Fucillo. Goldberg did not want to tell because he had once been compromised. (683) He stated that Guthrie and one Lipton had written commitments for the insurer on Goldberg's letterhead causing the insurer not to do business with Goldberg anymore. (686) Guthrie had assured Fucillo the bond was forthcoming and had been approved. (688) The same assurance was

given after the visit to Goldberg. (688) Cauble and Guthrie both falsely told Fucillo they were trying to clear technicalities. (689)

Cauble and Guthrie delivered a package including a bond form to deliver to a bonding agent, O'Grady, at Goldberg's request. (689-90) They delivered the package at a Christmas party and left. (690) At a meeting Cauble and Guthrie falsely assured Fucillo the bond was forthcoming and was held up over technical problems. (693)

Cauble took two trips to St. Louis. On the first trip he met with one Lumetta and discussed Fucillo's bond; Lumetta would finance it if it were forthcoming. (694) On his return Cauble was assured by Guthrie that the bond would be forthcoming; he had to get Goldberg to move it through. (696) Cauble and Guthrie then daily falsely assured Fucillo that the bond was forthcoming. (697-98) Cauble went again to St. Louis with Guthrie's assurance he would be sent a bond there. (700) The bond didn't come, and Cauble returned, Guthrie saying that Goldberg was still in California. (702)

Cauble and Guthrie then gave Fucillo false assurances that there were no problems and there was a bond. (703) When Guthrie told Cauble to tell Fucillo he was leaving for St. Louis with the bond Cauble told Fucillo that he and

Guthrie had been lying. (704) But Cauble thereafter falsely told Fucillo that the bond was really approved. (704) O'Grady announced he was not going to have anything more to do with the deal. (707) Goldberg said he had another company to do it and then took the papers from Cauble, but dropped out when the FBI visited him. (707,710)

In November 1975 Cauble first heard of Wilson's needs for his Florida nursing home. (711) He met Wilson in December when Guthrie brought Wilson to Glass' office. Prior to this he and Guthrie had discussed getting a bond through Goldberg. (711) Guthrie said at the meeting a bond would be forthcoming the next day. (712) At a subsequent meeting in Glass' office they waited for the bond. (714) Five thousand dollars was transferred into Glass' account for the bond fee. Goldberg, however, could not be reached. (715) A few days went by, and Cauble falsely assured Wilson and his attorney Jones that the bond was forthcoming, it was being held up by technicalities. (717) Guthrie made similar false assurances. (718) Glass gave them a check when they demanded their money back; Guthrie and Silver said to continue with the financing, the bond could be done another way, and Silver was not giving the money back until he had exhausted all means of solving the problem. So Glass stopped payment on the check. (718-19)

Cauble never drove a car to Guthrie's hotel on the 16th, and didn't have a bond in his briefcase or bring a bond to Guthrie. (720)

Cauble testified that by December 10 they were really pushing to get the bond because they had received the money to do it. (773) Goldberg had looked over the package before December 3 and had assured Cauble it looked good on the surface. (780) As a financial consultant himself, Cauble felt it had some weaknesses but it was possibly doable. (781) There was a time when Cauble intended to produce the bonds for Fucillo. (811) He made \$500 on the deal, (811) and went to St. Louis to get the financing ready for the bond, and with the intention of ultimately seeing the deal through to completion (812)

DAVID WILSON, owner of a Florida nursing home, testified that Fred Wohlfeld in November 1975 told him the needed financing could be obtained through United Housing Corp., owned by Jerry Silver. (836) A contract was reached and Wilson gave \$5000 to Wohlfeld. (840-41) All but \$1,000 of the \$5,000 was returnable if the bonds did not come through. (840) Wohlfeld and Silver later told Wilson there would be no problem in having the bond issued, (843) but then Wohlfeld started making excuses. (850-51) Wohlfeld came to New York with Jones, his attorney, and met with

Guthrie, Glass, and Cauble, who assured him the bond would be provided. (851-54) The next day Wohlfeld asked Wilson for \$5,000, and Wilson had the money transferred from his bank to the trust account of the Glass law firm. (858-59)

Wilson went to New Jersey (where his funding bank was located) after Cauble directed Glass to pick up the bond with Cauble's car. (861-62) In New Jersey Wilson called several people and received excuses about the bond; nothing happened and Wilson returned to Florida. (863,864) Wilson returned to New Jersey and Guthrie told him they had the bond in Cauble's car. (866) The next day Guthrie said the bond would be ready any moment and would be picked up. (866) Wilson did not get the bond. (888) Guthrie picked up and returned his financial package, saying the insurance company had lost so much money that year they didn't want to write any more bonds during the calendar year, but after January second a bond could be obtained. (890) Guthrie also said they could get a \$300,000 instead of an \$800,000 bond. (891) The day before the \$5,000 wire transfer, Silver was told at a meeting in Guthrie's presence that the bond was ready; that night, with Guthrie and others it was assumed the bond was ready. (917-18)

KAY JONES, Wilson's lawyer, and the last witness to testify, essentially corroborated Wilson's testimony. (919 et seq.) On the second trip to New Jersey Guthrie told Jones the bond had been issued and was ready to go. (944) Jones asked for particulars, and Guthrie said no problem, it's in the car and Cauble is parking the car. Guthrie said he couldn't stay on the phone and would call back on another phone. Jones called back and was told by Guthrie's wife that Guthrie was indisposed. (945) Guthrie had not specifically said he had seen or not seen the bond in Cauble's car. (956)

That concluded the testimony on behalf of the Government.

A stipulation was read to the jury that Guthrie was convicted in January of 1976 after trial the prior December in Federal Court in California of conspiracy, interstate transportation of stolen property, and aiding and abetting, and that the conviction was presently on appeal. (972)

Both sides rested, the defense offering no evidence. (973)

Defendant's motion for a judgment of acquittal was granted as to Count Six of the indictment, the travel fraud. (995-96) As stated previously the jury convicted Guthrie of five counts of mail fraud (18 U.S.C. §1343)

POINT I

THE EVIDENCE WAS INSUFFICIENT
TO GO TO THE JURY

Appellant conceded that the Government proved beyond doubt that he breached contracts, that he is sloppy, irresponsible, even unethical, that he was a liar, and that in general it is probably a mistake to do business with him.

What was not proven was that appellant committed the crimes for which he was on trial.

As defined by the Judge for the jury, the appellant was accused of devising or participating with others in a scheme to defraud by promising bonds and collecting advance payments with no intention of ever delivering the bonds.

(A-11-12, A-17) The standard for the sufficiency of evidence to go to the jury is:

Whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.
United States v. De Garces, 518 F.2d 1156, 1159 (2d Cir. 1975).

Thus, this Circuit requires that an objective evaluation of the evidence shows that a reasonable mind must be convincible beyond a reasonable doubt for there to be a jury question. The evidence below, presented entirely by the Government, did not satisfy this standard. That the evidence was enough for a disinterested observer, or even a civil jury, to reach the opinion that appellant had acted with criminal intent is not contested. That a reasonable person could decide beyond a reasonable doubt that appellant committed crimes is.

The prosecutor's opening statement painted appellant as "the ringleader," "Sy Guthrie and his band of confidence men," the man who assembled the group, "the cook who stirs up all the soup and mixes in the needed ingredients." (1, 10, 11, 19) To portray in the opening a defendant who is a ringleader as the ringleader is, of course, "the name of the game." To do so and then fail to introduce evidence that he is the ringleader--in a case where three co-defendants (Glass, Cauble, Silver) testify that they have pleaded guilty and defendant stands on trial alone--is a damning, unfair tactic. From the outset the prosecutor's unsupported opinion fatally colored the case.

The Government's theory of the case as expressed in its opening was reasonable. However, the evidence adduced

to prove this theory was ludicrous. William Glass, a co-defendant and supposed co-schemer, testified that he hadn't started out with the intention to defraud anybody, but that things just didn't work out. (399,485) [Even the prosecutor conceded Glass didn't at first know that a "victim" had been told untruths. (380)] Stanley Silver, another co-defendant and supposed co-schemer, testified he had acted in good faith all along. (571, 588) Richard Cauble, the third co-defendant and supposed co-schemer of appellant's to testify said he had intended to get a bond and that by December 10 (the middle of the alleged scheme) the group of "schemers" was really pushing to get a promised bond. (773, 781, 811, 812) If the only three co-conspirators to appear testified as to their innocence, on what basis could a jury reasonably be convinced beyond a reasonable doubt that appellant was part of a scheme to defraud? Of course, the natural reaction to the fact that these three witnesses had pleaded guilty in the case could not legally be used as evidence against appellant. The prosecutor, though, before finishing one full page of his opening statement poisoned the jury's mind: "they have pled guilty to charges against them and will provide you with an inside look at how all of these defendants so effectively applied their swindlers' trade. . . . "

[Naturally, the prosecutor then gave lip service to the rule that the guilty pleas are evidence of absolutely nothing. (8)] After hearing that appellant was the ring-leader, and that his henchmen had pleaded guilty, how could the jury judge the case on the evidence?

As stated above, appellant conceded the evidence proved him a liar. The demonstrated lies occurred, however, after the supposed object of the scheme--the advance fees for the bonds--had been obtained. [There was evidence that the parties supposedly engaged in a swindle stood to make much more money from commissions upon securing the bonds. (473-74)] Evidence of untrue statements prior to one payment were never connected to appellant, who was present but did not make the false statement, nor was Guthrie proven to have known the statement was false. (917-18) Since these advance fees, involving the princely sums of \$6250 and \$10,000 for the two victims, presumably to be split among at least the six indicted co-schemers, had been obtained before the lies that appellant was shown to have made or been a party to, there was no direct evidence of intent to defraud. The Trial Judge and this Court are required to take into account common sense and the ordinary experience of life, which teaches that people,

including businessmen, lie all the time to buy time and to stall annoying clients--as the prosecutor characterized appellant's conduct. (1051, 1063) But such lying is not criminal. For the Government to prove appellant lied after the money was obtained, and in the face of evidence that efforts were made to obtain the bonds and that "co-schemers" were acting in good faith, and stood to make more if the bonds went through, is to inject reasonable doubt into the case as a matter of law.

There was also much evidence of false assurances given the supposed victims. But there was no evidence that bonding deals always go smoothly (the whole transaction was in the nature of "finding," as when middlemen earn finder's fees for obtaining mortgages, etc.). There was no evidence that the participants in such deals always tell the truth during the execution stage. There was no evidence that the people claimed to be used to obtain the bonds, such as Goldberg, were sham contacts and of no value. The evidence painted a not very pretty picture of a particular wheeler-dealer and his methods, but to say guilty intent can be inferred beyond a reasonable doubt in the teeth of the testimony of good faith efforts is to hold an opinion of guilt,

not reach a determination of guilt. Even one of the telephone conversations played to the jury hammered home appellant as a big-mouth, not a crook:

Sy! Well, I'll tell you, Sy gets out and he promises certain things, to people and when he drinks a little bit makes some promises he can't keep and then he tries to just keep buying time, Ed, and it's not good.

(000376)

This was Cauble's opinion, a man who the prosecutor presented as one who knew the "inside" of what was going on. If Cauble thought appellant was a sot, a loose talker through an alcoholic haze, how can the Government be said to have proven criminal intent beyond a reasonable doubt?

The Government's case depended on showing the appellant did not intend to obtain the bonds. Yet there was much evidence of attempts to use Goldberg's connections to get the bonds--without evidence that Goldberg was a sham. Silver, who had dealt with people such as Goldberg, based on his experience and what he saw of Goldberg believed Goldberg was legitimate. (599-600). If Silver, one of the "inside" men thought Goldberg was legitimate, could a jury disregard this evidence and not have a reasonable doubt that the men were acting legitimately at the time they were claimed to have criminal intent?

The meeting at Goldberg's house in Brooklyn also proved that there was no scheme--or at least injected reasonable that there was a scheme. No alleged victim was at this meeting, yet Goldberg refused to reveal the name of the insurer, and gave his reasons. (296-98, 683) If there was a scheme to defraud by not attempting to get the bonds, why was Goldberg reticent in the exclusive presence of co-schemers?

Cauble testified he went to St. Louis with no victim present and spoke to one Lumetta about financing for Fucillo's bond. (694) Why did Cauble do this if there was a scheme not to obtain the bond?

Goldberg told Glass with no victim present that with time the bonds would come through, with additional documentation. (312-13) How was this in furtherance of a scheme not to obtain the bonds? Reasons were given to Glass for the delay in the bond, and Cauble's trip to St. Louis was discussed with Glass, all in the absence of victims. (325-27, 328-34) Glass was supposedly a co-schemer--what was he scheming to do? Glass testified he thought around the end of the year Cauble began to "lose heart." (344) About what--that the scheme wouldn't work because the bonds were being obtained? Or that the bonds were proving elusive? If the latter, why lose heart if the plan was to not obtain them?

Goldberg eventually told Glass he had been harassed and could not get the bonds and the deal was off. (373) How could this conversation, very late in the "plot," in the absence of a victim, be part of a scheme?

Glass stood to split part of 5% of any loan he obtained for Fucillo. (414) How was this arrangement part of a scheme not to obtain the bonds? (See also 434 and 440 on Glass' efforts and eagerness to obtain the bond for Fucillo.) Glass testified appellant had a similar financial incentive to obtain the bonds for both "victims." (417-18, 478)

Silver, another supposed co-schemer, had successfully obtained financial guarantee bonds for over ten years, and had acted in good faith all along. (571, 588, 592) How was a scheme carried out with Silver's participation?

Goldberg told Cauble without a victim present that he had not yet submitted the package to a bonding agent. (683) How did this fit a scheme not to try to obtain the bond?

Cauble went to St. Louis not once, but twice, without a victim. (694, 700) Why did he travel as part of a scheme to do nothing? Cauble, a financial consultant, felt the package was weak but doable. (781) How did he act with fraudulent intent?

The Law is fond of saying that a conspirator is liable, substantively and evidentiarily, for the acts and statements of his co-conspirators. Why cannot it be said with at least a fraction of the fervor that a conspirator benefits from the acts of his co-conspirators? If the proof of appellant's guilt depended so heavily on what his co-conspirators did in this case, why doesn't their good faith and their efforts to obtain the bonds rebound to appellant's benefit? Can appellant be guilty of masterminding a plot (he was the "ringleader" who "stirs up the soup and mixes in the needed ingredients") if his "henchmen" were acting in good faith? If appellant is to be judged by the acts of his supposed co-schemers, logic would dictate he must benefit as well.*

In short, to uphold the District Judge's denial of the motion to acquit, this Court must find that a reasonable person was not required to have at least a reasonable doubt that appellant did not have the good faith his cohorts, testifying for the prosecution and without contradiction, said they had.

* It cannot be maintained that appellant is guilty for aiding and abetting innocents to perform criminal acts. The Trial Judge specifically rejected the Government's request to charge aiding and abetting under 18 U.S.C. §2. (1011) The prosecutor must have thought aiding and abetting was crucial, because after his request to charge was denied, he submitted a memorandum of law renewing the request. The request was again denied, Judge Bonsal stating "there is no aiding and abetting in this case. You say he is the ringleader." (1031)

No doubt the Government will claim that the prior conviction of appellant supplies the missing evidence of fraudulent intent. It is submitted that it is unfair to use a prior (allegedly) similar act to fill a lacuna in the case: such use of a prior crime puts an ex-convict at the mercy of the Government forever. If the prior crime can supply a deficiency in proof of criminal intent, then an ex-convict has no chance when put on trial because his ambiguous actions plus his prior conviction would always add up to sufficient evidence of guilt ("round up the usual suspects"). This Court is urged to disregard prior crimes when calculating the sufficiency of the evidence to go to the jury.

Even if the prior conviction is considered evidence to make a prima facie case, however, it is of no value. For reasons elaborated in Point II, infra, the prior crimes here (conspiracy and transportation of stolen property) were not similar enough to warrant an inference of criminal intent. They were valueless as a quantum of evidence of intent not to perform, since they had nothing to do with that type of state of mind. Evidence of breach of contract, plus lying after the contract is entered into, plus a prior crime having nothing to do with intent not to perform (especially as far as the jury was informed, see Point II, subd. 2), cannot add up to proof of guilt. The basis for a surmise may be there, but not one to be reached beyond a reasonable doubt.

If appellant promises to built a house next year, and fails to do so, will that be sufficient evidence of criminal fraud when considered with his prior conviction of conspiracy and interstate transportation of stolen property?

Of course, even if it is held that the prior conviction makes a prima facie case here, the reasonable doubt injected by the testimony analyzed above as to good faith would still remain.

In connection with the sufficiency of the evidence, it should be noted that although Judge Bonsal thought the very existence of a scheme to defraud was in issue (987), his charge to the jury assumed that the difficult factual issues had been resolved against appellant:

That telephone conversation, was it in furtherance of the conspiracy here?

(A-21)

[The Government has the burden of proof] that the defendant knowingly participated in this scheme and sought to make it successful.

(A-24)

[The prior conviction] may be considered by you only for one single purpose, and that is, the issue of the defendant's knowledge and intention when he did the things which you have heard testimony about.

(A-24) (Emphasis added in all)

It is clear that the prosecutor's theory of the case was that breach of contract equals criminal intent.

Examining Cauble, the Prosecutor asked:

Q At the meeting at Mr. Goldberg's house he told you he had no bond?

A That is correct.

Q And you previously told Fucillo there was a bond?

A That is correct.

Q At that point you realized you had been lying to Fucillo?

This is a stupefying confusion of the concept of lying. How can one "realize" that one has been lying? Evidently the Prosecutor believed that a false statement is a lie, regardless of state of mind. This theory was consistent with the Government's case, which put innocent lack of knowledge on the part of one schemer, together with representations he made, in combination with knowledge by another schemer who did not make the untrue representation. It was as if all the schemers together were not persons, but a single organism, each part of which was responsible for what the other part knew. To expect the jury to sift out the hundreds of co-conspirator statements while seeing if appellant was "connected" to a conspiracy without these out-of-court statements, when even the Prosecutor did not know the difference between fraud and innocent misrepresentation, is to be optimistic beyond reason.

When it is considered that the entire trial was of a man's state of mind during a business venture, there was no heroin, no loaded gun, stolen property or other contraband to make state of mind a relatively minute issue, the conclusion must be reached that as to whatever the evidence proved, there was a reasonable doubt as to Guthrie's guilt.

POINT II

ADMISSION OF APPELLANT'S PRIOR CONVICTION WAS REVERSIBLE ERROR

This Court has upheld the admission of proof of crimes not charged in the indictment probably hundreds of times, and appellant does not dispute the rule of admissibility, now sanctioned by Federal Rule of Evidence 404(b). It cannot be gainsaid, however, that any person with five minutes' experience with criminal trials knows that once proof of another crime comes in the trial is usually at an end. That is why prosecutors turn cartwheels to have the evidence exposed to the jury, and why so many defendants make the agonizing election not to testify in cases where the prior crime could come in only by impeachment. All appellant submits is that the rules governing admissibility must be strictly followed, or all notions of fair trial are lost. While in this case, as in other cases, a prior crime would have been admissible on the issue of fraudulent intent, the prior crime used by the Government here was not. Since once the jury heard of the prior conviction appellant lost his chance to have the case decided on the ambiguous evidence of his intent, erroneous admission of the prior crime requires reversal.

1. The prior crime was not similar to the crimes charged in the Court below.

The authorities are unanimous that a prior crime can be admitted only if it is similar to the crime for which the

defendant is on trial. See, e.g., United States v. Beno, 324 F. 2d 582, 587, 589 (2d Cir. 1963) (Kaufman, J.) ("This requirement that past crimes be of a similar nature before they are admissible on the issue of intent gives effect to one of the most fundamental notions known to our law--that a man is entitled to be tried only for specific charges explicitly stated, and should not be compelled to defend a lifetime of conduct." "[A] criminal defendant is entitled to. . . not risk the possibility of conviction for a series of prior specific acts which collectively suggested that his career had been reprehensible"); United States v. Leonard, 524 F. 2d 1076, 1091 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976) (Friendly, J.) ("The probative value of similar acts used to prove wilfulness or intent is dependent on the existence of a close parallel between the crime charged and the acts shown..."); 2 J. Wigmore, Evidence §302 at 196, 200 (3rd ed. 1940 ("[I]t is at least necessary that the prior acts should be similar." (Emphasis in original)). Even the prosecutor below emphasized the need for similarity when he induced Judge Bonsal to admit the prior conviction. Government's Memorandum of Law and Offer of Proof Concerning Similar Acts 10 n.* ("It must be remembered that it is the similarity of conduct which determines relevancy,

* The indictment was not an exhibit below, but was annexed to a memorandum of law submitted by the Government. Of course, it can be judicially noticed. F.R.Ev. 201(b)(2).

not identity of language in the statutes violated," quoting United States v. Santiago, 528 F. 2d 1130, 1134 (2d Cir.), cert. denied, 425 U.S. 972 (1976)).

The crimes appellant was on trial for were devising fraudulent schemes. The prior crimes the Government offered were contained in a conviction in the United States District Court for the Central District of California (verdict in December 1975, sentence in January 1976) for conspiracy (18 U.S.C. § 371), interstate transportation of stolen property § 2314, and aiding and abetting §2. Aiding and abetting can be dismissed as a similar crime for obvious reasons. The issue therefore is whether conspiracy and transportation of stolen property are similar to fraudulent advance fee bond schemes, based on intent not to perform promises. Defense counsel maintained they were not. (876-81)

Aside from the broad classification of these crimes as non-violent, similarity is lacking. Moving stolen goods across state borders and defrauding people do not seem to be related by any state of mind, which is the issue the prior crimes were admitted on. The California indictment charged appellant with conspiracy (in the count he was convicted of) to violate seven laws, forbidding: transportation of stolen securities (18 U.S.C. § 2314), transportation of forged securities (§ 2314), travel fraud (§ 2314), receiving stolen securities (§ 2315), wire fraud (§ 1343), misapplication of

bank funds (§ 656), and making false bank entries (§ 1005). The verdict of guilty of conspiracy did not specify which of these seven possible laws defendant was found to have conspired to violate. (877) How can it be said there was a conviction of conspiracy similar to the case on trial below? Conspiracy to transport stolen or forged securities does not entail a mental state similar to advance-fee bond frauds, which essentially consist of making promises one does not intend to keep.** As to misapplying bank funds and making false bank entries, can it be fairly said that one can discern a promisor's intent from the fact that in the past he committed these crimes, without at the same time making the impermissible inference of criminality from a supposed criminal character or propensity to commit crimes?

The substantive crime of which appellant had been convicted was, as stated, interstate transportation of stolen property. How is this crime similar in terms of intent to making false promises?*** Only by doing that which the law forbids,

** It should be noted that while the indictment charged conspiracy to transfer bonds that were stolen, converted, and taken by fraud, in the usual conjunctive pleading, the statute requires the element stolen, converted, or taken by fraud. Thus, it cannot be said that, even if it was known that appellant was convicted of a conspiracy to violate this particular statute, a fraud was proven. Besides, the conspiracy could have been merely to transport the securities, and not entail the stealing, converting or defrauding.

***See footnote**, supra, also applicable to the substantive counts. It should also be noted that appellant was not, as his co-defendants were, indicted for travel and wire fraud. Hence, as defense counsel pointed out below, the most reasonable inference is that the conspiracy to commit those frauds related to appellant's co-defendants only. (878)

i.e., seeing appellant as a "criminal" instead of a person on trial for particular acts, can one make an inference from the prior case to intent in the instant case.

But what if the stolen goods in California were taken by fraud? There is no evidence that they were; Judge Bonsal stated "I don't know if they were stolen or taken by fraud or how." (879) Thus even the Trial Judge had no basis for concluding there was a similarity between the crimes. And this is so even though Judge Bonsal had specifically stated "I mentioned earlier that I thought if [the Government were to offer evidence of the prior act] I thought you ought to have some evidence by somebody who allegedly was defrauded." (870)

Proof positive that Judge Bonsal had no basis for concluding that the requisite similarity was present occurred when he ruled on requests to charge. The Prosecutor, evidently realizing in a midnight panic that the conviction had been improperly admitted absent a showing of similarity, said:

"Your Honor, if I could make one point getting back to the similar acts stipulation. I was thinking about that the other night, and I would ask your Honor if we could modify that stipulation to this slight degree, that it be, your Honor could put it in your charge and we need not do it at any point before that, but since it is introduced as a similar act I think that the conviction for conspiracy your Honor should instruct the jury was a conviction for conspiracy to commit financial crimes, because you could commit conspiracy to rob a bank or to steal some television sets off a truck in New Jersey and transport them to New York, I think that is a similar act for it to be probative for the jury they should be aware that it was a conspiracy to commit financial crimes as the 'means' paragraph in the conspiracy count says. (1005)

Thus, even the Prosecutor now admitted there was no basis for admitting the prior crime thus far. Judge Bonsal's comment was even more illuminating:

I just don't know enough about that California case. (1005)
After brief colloquy, Judge Bonsal said:

"I think the most you are saying, and I don't know enough about that California case, if it is transportation of property obtained by fraud, if that's what you are saying, I would think that might make--if that is the fact on the California one, he didn't actually get and steal it, but he--

MR. KAPLAN [for the Government]: The conspiracy count charged wire fraud, travel fraud, bank fraud and other financial crimes. It was a mild swindle of the investing public is in essence what that case was about. They were all financial crimes. They weren't--

THE COURT: I don't know what a financial crime is. That's the point. I think I could understand what you say it was a white collar crime as distinguished from a blue collar crime, but I think I would be receptive if that is the fact and if Mr. Thau agrees to it, instead of having the jury think this guy is a common thief, because I am only charging it on knowledge and intent, to say that I charge that he transported property in interstate commerce which he had obtained by fraud." (1005-06)

Thus, the Trial Judge clearly stated at least three times that he didn't know enough about the prior crime to conclude similarity--and this after he had read the Government's submission which included the California indictment and judgment. (876) The Prosecutor vigorously tried to convince Judge Bonsal, but he adduced no facts or evidence--as distinguished from his own conclusory opinions--to prove that the California verdict indeed involved fraud, as opposed to ordinary theft or other irrelevant conduct.

That Judge Bonsal did not know enough to hold that the prior case was similar did not hinder the Prosecutor. In his summation he stated:

"As you ladies and gentlemen learned last week, just around the time that Guthrie was swindling Fucillo and Wilson, he was being tried and convicted out in the Federal Court in Los Angeles of engaging in a criminal conspiracy, a criminal partnership with other people, to violate the law as well as of committing other crimes which required him to be found to have acted with fraudulent intent.

MR. THAU: Objection to that. That is not what the stipulation is about.

THE COURT: I will cover the stipulation." (1041)
(Emphasis added)

Thus, that Judge Bonsal had been unable to find fraud in California, and that the stipulation did not say there was fraud, were hardly obstacles to the Prosecutor.*

It must be recalled that the courts and authorities require similarity because the probative value of the prior act is nullified if it is not similar. It is axiomatic the jury is not supposed to convict appellant for being a "criminal type", i.e., one who tends to commit crimes. Fed. R. Ev. 404(b). But if the similarity requirement is stretched to the breaking point--or disregarded, as here--of what use are the legal safeguards hedged around proving prior crimes? It is quite easy

* Out of an excess of caution appellant submits that this Court cannot decide that there was similarity on the basis of information not before the court below. Certainly, the jury, which had to know of the similarity (see subd. 2, infra), would not be privy to information not in the record, and defense counsel is obviously in no position to litigate what should be told the jury based on new information submitted on this appeal.

for anyone, lawyer or layman, to say that a man who transports stolen goods is capable of fraudulent promises. This is precisely what prior crimes may not be used for-conclusions on character or propensity. Appellate courts generally and this Court in particular are all that stand between a defendant and the ordeal of trial by past behavior. Can it honestly be said that one can ascertain appellant's intent in this case by knowing that he once transported stolen property? What would the reasoning look like? This is not a case of two "transactions of the same kind", United States v. Walker, 176 F. 2d 564, 566 (2d Cir.), cert. denied, 338 U.S. 891 (1949) (L. Hand, J.), such as two sales of cocaine; United States v. Smith, 343 F. 2d 607, 609 (2d Cir. 1965), or two mail frauds; United States v. Rosenblum, 339 F. 2d 473, 475 (2d Cir. 1964), or two stock-jobbing enterprises; United States v. Shurtleff, 43 F. 2d 944, 948 (2d Cir. 1930), or prior acts of prostitution committed for a defendant in a Mann Act prosecution; United States v. Ratley, 284 F. 2d 553, 554 (2d Cir. 1960), or dealings in counterfeit money orders; United States v. Braverman, 376 F. 2d 249, 252 (2d Cir.), cert. denied, 389 U.S. 885 (1967), or similar instances of perjury; United States v. Freedman, 445 F. 2d 1220, 1224 (2d Cir. 1971).

Appellant does not submit that the prior crime must involve identical conduct. But if the requirement of similarity has any meaning at all, as illustrated by the above decisions it cannot be said that dealing in stolen property

bears in a legally helpful manner on intent to keep promises. Moreover, because "prior crimes, like mail fraud and conspiracy...can arise in so many different factual contexts... greater caution must be exercised to show a basis of factual similarity before [such crimes] are admitted to show state of mind in a subsequent crime". United States v. Klein, 515 F. 2d 751, 757 n. 14 (3rd Cir. 1975).

Admission of the prior conviction was obviously not harmless. The jury was faced with a mass of transactions which could either have been bad business practice, bad ethics, even reflective of an immature psychology and character--or could have found the evidence reflected normal business customs. Hearing that appellant was a convict had to be devastating, and the lack of logical connection between the crimes meant the jury was forced to use the prior crime on the forbidden issue of criminal propensity.

2. The prior crime was not presented to the jurors in a manner so they could intelligently deal with it.

Even if the conviction was admissible, the court practically threw the evidence at the jurors without explaining how they should use it. Judge Bonsal never even told them not to use it on propensity, as evidence that appellant tends to commit criminal acts. Without instructions they could comprehend, the jurors had no choice but to use it for what it was worth to laymen: proof of appellant's evil nature.

The jurors never had a chance to use the purported similarity because no explanation of the similarity was ever given them. Defense counsel insisted that the jury be given enough to make a rational conclusion, by having the California witnesses testify to the prior acts. (878-79) See United States v. Klein, 515 F. 2d 751, 757 n. 15 (3rd Cir. 1975). This was denied. (880, 881) The court asked defense counsel to stipulate as to the precise manner of proving the prior crime, ruling that if a stipulation were entered the defendant's rights would be preserved for appeal. (881, 882)

Defense counsel had no choice but to stipulate. Judge Bonsal said he would let the judgment of conviction in if there was no stipulation. (963) Whether he would include the part of the judgment that contained the 18-months sentence of imprisonment on each of the four counts (to run concurrently) was unclear. When first ruling that the prior acts were admissible, Judge Bonsal had said "I don't like the judgment to go in because the judgment would increase [sic; "include?"] the sentence. I don't like to put this piece of paper in evidence if it can be avoided." (882) Later he said "I don't think we want to get into that. We will get into a long discussion about it. What I said about the stipulation was that I would have to receive that information [the sentence?] and it would be a part of that judgment and I don't want to receive it if I can avoid it." (963) Defense counsel was certainly "on the spot" regarding the California sentence.

The stipulation thus compelled was the jury's entire knowledge of the prior acts:

"It is hereby stipulated and agreed by and between the government and the defendant that the defendant was convicted on January 19, 1976, after trial in December of 1975, in the United States District Court for the Central District of California, of the crimes of conspiracy in violation of Title 18, United States Code, Section 371, interstate transportation of stolen property; in violation of Title 18, United States Code, Section 2384, aiding and abetting; in violation of Title 18, United States Code, Section 21; and that said conviction is presently on appeal." (972)

Thus, instead of hearing witnesses testify to appellant's prior acts, the jury was sonorously informed that the United States Government had previously seen fit to prosecute appellant, and that a federal court after trial had found him guilty of violation of three federal statutes. The difference between hearing that appellant had committed a prior criminal act and that appellant had already caused enough commotion to warrant a prior federal prosecution is substantial, to say the least; at a minimum it would reduce the seriousness of the jury's function by showing jurors that appellant had already been branded a criminal by the United States Government. However, unrealistically, laypersons still use the expression "to make a federal case out of it". Appellant must have seemed a public enemy after the stipulation was read.

It will be quickly observed that the jury never had the slightest idea of any similarity between the prior crimes and the case on trial; how could it? Later, when the court

considered requests to charge, the Prosecutor proposed that the jury be instructed that the conspiracy was to commit financial crimes, and Judge Bonsal, as shown by the colloquy quoted above in subd. 1, indicated his conclusion that he didn't know enough about the prior crimes to rule that way. The court nonetheless offered to charge that appellant had "transported property in interstate commerce which had been obtained by fraud". (1006) Naturally, defense counsel objected, since his consistent position was that there was no similarity because there was no way of determining that the California jury had found conspiracy to defraud. Defense counsel rejected the court charging it was a "financial crime", saying "I'd sooner they thought of him as a common thief as your Honor just said rather than an uncommon one." (1007)

This was not a waiver of the right to have the jury told the reason why prior crimes are admitted, i.e., because of the probative value arising from similarity. In context it can be seen that defense counsel was rejecting the court telling the jury that about which there was no evidence: that the prior crimes were fraudulent ones. Defense counsel did not maintain that, given evidence of similarity, the jury should not hear it.

It was still required that the jury be educated to the fact they had to know how to intelligently use the prior crimes, namely, that they were similar to the case on trial. This was never done; no facts or explanation were laid before them to guide them in their handling of this explosive evidence. How

can it be said the jury used the prior crimes properly? To mouth the usual formulas about considering the crime only on intent and knowledge when the jury is ignorant of the logical relationship between the prior crime and the issue of intent is farcical. Accord: United States v. Klein, 515 F. 2d 751, 756 (3rd Cir. 1975).

In fact, the instructions given on the limited use of the prior crimes were penurious in the extreme. When the stipulation was read to the jury, Judge Bonsal properly and concisely explained to the jury that the only purpose for the evidence was to consider it not on guilt, but on the issue of knowledge and intent. Judge Bonsal promised "I will instruct you in more detail about that in connection with my charge when I give it to you. I want you to understand that [the brief instruct] now." (973) The promised "more detail" never came.

During the charge, all Judge Bonsal said about the prior conviction was as follows:

"Then you will recall, ladies and gentlemen, I think it was right at the end of the trial that the parties entered into a stipulation that Mr. Guthrie was convicted on January 19, 1976, after trial in December of 1975 in the United States District Court for the Central District of California of the crimes of conspiracy in violation of Section 371 of the United States Code, interstate transportation of stolen property in violation of Section 2314, and aiding and abetting in violation of Section 2, and that said convictions are presently on appeal in California.

Now, of course, I mentioned that at the time-- and I will repeat now--Mr. Guthrie is not charged with any of these crimes here. Therefore, this evidence may be considered by you only for one single purpose, and that is, the issue of the defendant's knowledge and intention when he did the things which you have heard testimony about. You will consider it only for that, knowledge and intent, and for no other purpose at all." (1136) (A-25)

Assuming the jurors were not criminal lawyers, what exactly were they to do with this instruction? What did telling them to use the conviction only on knowledge and intent mean to them? To a layman, it would naturally mean use it as evidence of defendant's nature to commit crimes. In fact, Judge Bonsal did not charge the jury not to use it in that manner explicitly; he merely said use it only for the stated purposes. But how could a jury know the difference? See United States v. Blount, 229 F. 2d 669, 671 (2d Cir. 1956); United States v. Klein, 515 F. 2d 751, 756 n. 10 (3rd Cir. 1975). To throw the stick of dynamite in the jury's lap without analysis, example, or other helpful guidance and to expect them to use it in the excruciatingly careful manner that the law demands is more than this Court should expect. The jury system works provided only that the jury is told how to perform its task. The Court's charge here was but an incomplete pantomime of the law.

The charge was plain error. This Court reverses convictions when the instructions do not meet minimum standards, even absent an exception. This is such a case. See United States v. Clark, 475 F. 2d 240, 250 (2d Cir. 1973)

(instructions on intent); United States v. Fields, 466 F. 2d
119, 121 (2d Cir. 1972); United States v. Byrd, 352 F. 2d
570, 574 (2d Cir. 1965) (intent).

POINT III

ADMISSION OF HEARSAY PROOF OF A PRIOR
BOND FRAUD BY APPELLANT WAS REVERSIBLE
ERROR

Incredibly, after reading a brief and hearing extensive argument over whether a prior conviction should be admitted as proof of a prior similar act, the court below admitted after the most cursory consideration hearsay evidence of a different prior act, similar to the case on trial, and without even cautioning the jury as to how to use it. This evidence was duly objected to by defense counsel and was used by the Government in summation--not once, but twice. Any argument that this evidence was harmless is belied by the Prosecutor's vigorous utilization of it, if not by the closeness of the case.

During direct examination, Cauble was asked what Goldberg, who had connections for writing bonds, had told him as to how Goldberg had been compromised with a Maryland bonding company. (684) (Earlier, Goldberg had told Cauble in appellant's presence that he would not tell them who the bonding company to be used for Fucillo's bond was, since Goldberg had lost the Maryland company when he had been compromised a year before). The conversation took place two or three days after the meeting in Goldberg's house, and was outside appellant's presence. (685-86)

When Cauble was asked what Goldberg told him, defense counsel objected, pointing out that the Government was trying

to elicit an alleged prior & similar act, without prior notice to the defense as required by this Court and by quoting a person who would not be a witness. See United States v. Baum, 482 F. 2d 1325 (2d Cir. 1973). The Prosecutor claimed it was not a similar act, but was used to show Goldberg's explanation of why he didn't want the name of the bonding agent revealed. (684-85) The court admitted the testimony, without telling the jury for what purpose:

"I kept pressing for the name of the bonding company and [Goldberg] told me he had been compromised approximately a year before, that Mr. Guthrie and Mr. Lipton had written commitments on [Goldberg's] letterhead committing Maryland Casualty and caused them to not do business with him any longer." (606)

The effect of this testimony must have been devastating. Appellant, on trial for bond commitment frauds, was accused by somebody in a position to know of perpetrating bond commitment frauds a year earlier! When summation time came, the Prosecutor, disregarding representations it had made to Judge Bonsal as to the use for which the testimony was offered, utilized this hearsay to good effect:

"We have seen in this case evidence of each of these great financial enterprises that Sy Guthrie was involved in: the A.M.M.I.C. bond which was used to get Wilson lined up but which Guthrie couldn't supplied to Cauble and which was supposed to be executed by Mr. Hopkins who, as it turns out, had no power to execute it; and Harry Goldberg on whose stationery Guthrie had written loan commitments by the Maryland Casualty Company. (1054-55)

Finally Guthrie tells Silver as well as Cauble that Haynes isn't coming but that he has another sure fire source for the needed bond: Harry Goldberg, the man that Sy Guthrie got canned by Maryland Casualty because Guthrie went off writing phony line commitments on Goldberg's headlines [sic]". (1066-67)

Thus, regardless of the Government's intentions when it introduced the evidence of the conversation, by summation the Government was prepared to make good use of the accusation for all it was worth. That the effect of the summation was to use this as proof of a prior crime is indisputable: if the Government needed an identification device for Harry Goldberg, who had been mentioned dozens of times during the trial, it certainly didn't have to refer to this accusation. The trip to Brooklyn, for example, which several witnesses testified to (Cauble 683; Glass 295) would easily have sufficed. In fact, Goldberg came over as the one colorful character in the case. If the Government wanted to use the accusation to explain the reason for not revealing the name of the bonding company, then it could have done so--but didn't even bother alluding to that context. What the Government was trying to do it did, namely, impress the jury with the prior bond fraud via hearsay.

At each mention in the summation, defense counsel objected, on the ground there was no evidence. This ground was eminently correct, since indeed there was no evidence for the purpose the Government had used the accusation on summation (it had been admitted for a different purpose).

Each objection was met with the court's statement that it was the jury's recollection which controlled as to whether there was evidence. This compounded the prejudice infinitely, since the jury, of course, had heard evidence of the accusation and had no idea it had been admitted for a different purpose. What could the jury do in the face of twice being told its recollection controlled but conclude there was overwhelming proof that appellant had committed prior bond commitment frauds? In fact, Judge Bonsal never did tell the jury to use this prior fraud only on the issue of intent, so the net result was that a prior dissimilar act (the California conviction) was admitted with limiting instructions (however useless) and a prior similar act, proved by hearsay, was admitted without limiting instructions.

Oceans of ink have been spilled on the law of evidence, a torrent not likely to diminish with the advent of the Federal Rules of Evidence. Of what use is the toil invested by the courts, the Congress, the advisory committees, and even the academics if the Government can get away with what it pulled here? To have evidence admitted for one purpose and to use it for another, mocks the law. There was no reason to let this accusation in for any purpose--how important was it in this case that the jury hear the reason Goldberg gave Cauble for not revealing the name of the bonding company? Did this reason prove

there was a scheme? Quite the opposite--only a legitimate conversation could have proceeded along these lines. The only purpose for the evidence was to prove appellant guilty of prior crimes. Even if, against all common sense, it is maintained the jury had to hear this reason, it could have been redacted, just leaving the name of Mr. Lipton alone, without distorting the story in a significant way. To tie the noose around appellant's neck on so flimsy a pretext should not be countenanced.

Hearsay, of course, is inadmissible. Fed. R. Ev. 802. This hearing fits no exception under Rule 803, and the catch-all of 803(24) was not complied with. No doubt the Government will now contend that the conversation was not hearsay because it was a statement of a co-conspirator during the course and in furtherance of the conspiracy. Rule 801(d)(2)(E). Even if this were so, it would not excuse admission for one purpose and use on summation for another purpose. Trial Judges should not be hornswoggled into admitting even admissible evidence; such tactics prevent them from weighing the prejudicial effect against the probative value, something they are enjoined to do. F. Rule Ev. 403. (No submission is here made, however, that the Prosecutor intentionally deceived the Trial Judge when he represented the purpose the conversation was offered for, because the only evidence of prosecutorial intent is the later events during the summation).

But a cursory analysis will show the statement was not in furtherance of a conspiracy. For one thing, Goldberg accusing Guthrie does not further any scheme. (If Goldberg's explanation is in furtherance, as stated above, the reasons could have been redacted). But far more broadly, how could Goldberg telling Cauble why he won't reveal the name of the bonding company be in furtherance of a conspiracy not to obtain promised bonds? The whole thing is preposterous. The Government claims there was a conspiracy not to obtain bonds, and would then have it that when one "schemer" tried to find out the name of the bonding company from another "schemer", and the latter refused to tell him, preferring to keep it secret for reasons of his own, all this is in furtherance of a plan not to obtain bonds! If the "conspiracy" was to obtain the bonds, then the Government's position regarding this conversation would be correct. If the "furtherance" requirement is to mean anything at all, then statements that legitimate persons would use while intending the opposite of the object of the claimed conspiracy cannot possibly be in "furtherance" of the claimed object. In fact, if Cauble was trying to bring off a bond fraud during this conversation, why would he want to know the name of the bonding company in the first place?

The only thing furthered by Goldberg's accusation was the unfair prejudicing of appellant's right to a fair trial. Cf. United States v. Pacelli, 491 F. 2d 1108, 1115 (2d Cir.),

cert. denied, 419 U.S. 826 (1974). In a case as close as this one was, with all kinds of co-defendants testifying and hearsay flying in and out of the courtroom subject to connections that were barely explained, appellant was entitled to more, much more.

CONCLUSION

It is respectfully requested that the judgment be reversed with directions to dismiss the indictment, or alternatively, order a new trial.

Respectfully submitted,

GLASS GREENBERG IRWIN PELLMAN
& SLADE
Attorneys for Appellant
540 Madison Avenue
New York, New York 10022
(212) 838-6670

OF COUNSEL:

Leonard R. Glass
John F. Triggs

Peter Lushing
Of Counsel
60 East 42nd Street
New York, New York 10017

COURT OF APPEALS
SECOND CIRCUITUNITED STATES OF AMERICA,
Appellee,

- against -

SY YOAKUM GUTHRIE, XXX III
Defendant-AppellantOn Appeal k from a judgment of the U.S. DI
Dist. Court for the So. Dist of N.Y.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

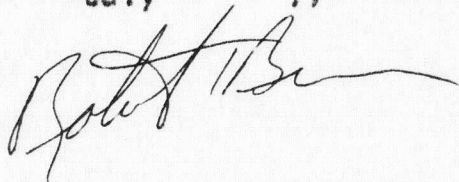
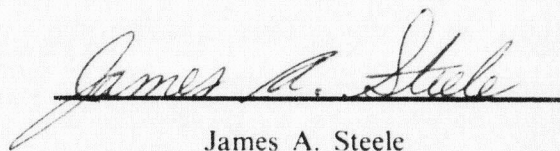
I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 29th day of July 19 77 at One St Andrews Plaza
deponent served the annexed New York, New York upon

Robert Fiske
U.S. Attorney So. Dist.

the Appendix in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this
day of July 19 29th
77

James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1979